

Institution: Newcastle University
Unit of Assessment: 20 Law
Title of case study: Successful Introduction of a new non-statutory rule of disclosure for Trustee Exemption Clauses
<p>1. Summary of the impact</p> <p>In 2010 the Ministry of Justice formally accepted recommendations by the Law Commission to introduce a new non-statutory rule of disclosure for trustee exemption clauses in England and Wales. Newcastle research had a direct impact upon the development of the law on trustee exemption clauses. In 2002 Dunn successfully tendered to undertake research on trustee exemption clauses in England and Wales on behalf of the Law Commission. Dunn's research was published by the Law Commission as a separate and distinct chapter of its consultation paper on trustee exemption clauses. The research (alongside consultation responses) influenced the Law Commission's recommendation that a non-statutory rule of disclosure be introduced into the law of England and Wales. This recommendation was accepted by the Government in 2010 and has been implemented by the trust industry.</p>
<p>2. Underpinning research</p> <p>A trust is a legal vehicle that allows property to be held and managed by one person (a trustee) for the benefit of another (a beneficiary). Trustee exemption clauses allow a trustee (the person who manages the trust and its assets) to be exempt from liability for breach of trust in all circumstances except fraud. This means a trustee can be exempt from liability for negligence. The question of the regulation of trustee exemption clauses was referred by the Lord Chancellor, Lord Irvine to the Law Commission (an advisory non-departmental public body sponsored by the Ministry of Justice which reviews the law and recommends changes) for consideration in 2000 (see HL Hansard 14 April 2000, Col394 http://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo000414/text/00414-02.htm). This was the result of criticisms raised in the Court of Appeal about the existence and extent of trustee exemption clauses in England and Wales and in which Lord Millett invited Parliament to consider the issue (see Lord Justice Millett, <i>Armitage v Nurse</i> [1997] 3 WLR 1046).</p> <p>Before embarking on a consideration of whether and how the law concerning trustee exemption clauses should be reformed, the Law Commission recognised that it first needed to understand the prevalence, role and use of trustee exemption clauses in England and Wales to determine if they were "sufficiently widespread to warrant intervention" (Law Commission, <i>Trustee Exemption Clauses</i>, Law Com No 301, Cm6874, June 2006, para 3.28). The Law Commission also needed to consider what mode of intervention might be appropriate. In 2002 the Law Commission invited 6 academic experts in the field of trust law and socio-legal studies to tender for the funding to undertake the research on their behalf. This was a competitive tendering process by invitation only. Dunn had an established reputation in the field on the basis of outputs in leading law journals including the <i>Modern Law Review</i> and <i>Legal Studies</i> and as editor of a book with leading law publisher Hart Publishing (set out in Dunn's publication profile up to 2002 at http://www.ncl.ac.uk/nuls/staff/profile/alison.dunn#tab_publications) and was one of the 6 invited to tender. Dunn's successful tender bid received funding of c. £40,000.</p> <p>Dunn undertook socio-legal research in Feb-May 2002 on behalf of and funded by the Law Commission. This research involved an extensive empirical study targeting the key actors with the three core groups in the practitioner community: (1) professional representative bodies, institutions and banks (including Association of British Insurers, Association of Corporate Trustees, Bar Council, Charity Commission, Chartered Insurance Institute, Law Society, Society of Trust and Estate Practitioners, National Association of Pension Funds, Institute of Actuaries); (2) professional and lay trustees; and (3) legal advisers to trustees and creators of trusts (termed 'settlers').</p>

Having successfully tendered to the Law Commission to undertake the research to inform the Commission's thinking on the subject, the findings of Dunn's research were published by the Law Commission as a specific and distinct chapter in its trustee exemption clauses consultation document (1), Part III). Dunn's research revealed previously unknown data on the role and impact of trustee exemption clauses, the attitude of trustees towards the clauses and whether regulation of such clauses would have an impact on investment of wealth in England and Wales. The research identified a broader range of issues relating to the commercial reality of day-to-day trust decisions, the difficulty of balancing freedom and autonomy of those who wish to create a trust with protection of the beneficiaries of trusts, the multi-layered nature of the trust and the transparency of the sector in which trusts operate.

Dunn's research and its findings on trustee exemption clauses on behalf of the Law Commission was the first of its kind in England and Wales, and there are no comparator studies in other countries. The research is an original statement on the use of trustee exemption clauses in practice and it makes previously unexplored linkages between the regulation of trusts and the challenges faced by those who wish to create trusts and have to administer them. The research has international relevance not just as a point of comparison for other common law countries that also have trustee exemption clauses, but also as an analytical foundation for developing key concepts in this legal area, for example in New Zealand.

3. References to the research

Dunn's research was published under the Law Commission's name as a separate and distinct chapter (Part III) of its consultation paper on trustee exemption clauses. This chapter was written by Dunn and the Law Commission's report provides full acknowledgement of the source (para 3.5).

- 1) Law Commission Consultation paper No. 171, Trustee Exemption Clauses, January 2003, Part III 'The Economic Implications of Regulating Trustee Exemption Clauses'. Available at: http://lawcommission.justice.gov.uk/docs/cp171_Trustee_Exemption_Clauses_Consultation.pdf

Funding grant details:

Alison Dunn (Principal Investigator), 'Socio-Economic Research on Trustee Exemption Clauses', Law Commission, February to May 2002, £39,400.

4. Details of the impact

Before embarking on a consideration of whether the law concerning trustee exemption clauses should be reformed the Law Commission recognised that it first needed to understand the prevalence, role and use of trustee exemption clauses to determine if they were "sufficiently widespread to warrant intervention" (Law Commission, Trustee Exemption Clauses, Law Com No 301, Cm6874, June 2006, para 3.28). To that end they commissioned Dunn to undertake this socio-legal research.

With this role in mind, Dunn's research formed a crucial building block in the Law Commission's initial 2003 consultation paper, enabling the Law Commission to understand and contextualise the prevalence, role and use of trustee exemption clauses as well as the views of trustees, settlors and their legal advisors on the importance of the clauses (ibid). The importance of the work was recognised at the time by the Law Commission which, in its Annual Report of 2003, stated that the "socio-legal research carried out by Dr Alison Dunn at the University of Newcastle upon Tyne greatly informed our work on Trustee Exemption Clauses" (IMP1), work which resulted in the Government's subsequent decision to introduce a non-statutory rule of disclosure.

Following consultation the Law Commission's final recommendations on trustee exemption clauses were published in 2006 (IMP2). The responses to the Law Commission's consultation paper mapped on to and reinforced the findings from Dunn's research: "The consultation process has provided significant support for the claims reported by Dr Dunn" (para 5.98) (IMP2). Whilst the Law Commission was keen in its consultation paper to propose statutory regulation, responses to the

Law Commission's consultation paper reinforced Dunn's research findings that there was a danger of economically and socially damaging over-regulation in this field (para 5.97) **(IMP2)**. As a result, the findings of the underpinning research as to the risk of over-regulation and the consultation responses influenced a change of approach by the Law Commission in its final report: "The impression that settlors may not fully appreciate the import of trustee exemption clauses is supported by Dr Dunn's socio-economic research. This found that settlors are generally not well informed about or particularly concerned with trustee exemption clauses, considering such clauses to be largely "administrative" provisions." (paras 3.38, 5.17, 5.19 and 6.8) **(IMP2)**. The underpinning research therefore facilitated a more economically and practically appropriate form of regulation in this branch of law.

Consequently the Law Commission's final recommendations in 2006 abandoned their initial proposal for statutory regulation prohibiting certain types of exemption clauses and instead put forward a proposal for a new non-statutory rule of practice governing disclosure and explanation of exemption clauses. Such a non-statutory rule meets two of the key requirements identified by Dunn's research which were that: (i) there needed to be some regulation of trustee exemption clauses to protect creators of trusts and those who benefit from a trust; and (ii) there needed to be better information available about trustee exemption clauses because those creators of trusts often have a lack of knowledge and understanding of the existence, role and import of trustees' exemption clauses and a general misunderstanding of the administration of trusts. This proposal for a new non-statutory rule has the effect of changing the law by setting out a positive obligation requiring paid trustees to take reasonable steps to ensure that the creator of a trust is fully informed of the meaning and effect of a trustee exemption clause before the trust is made (thereby allowing the creator of the trust the opportunity, once fully informed, to reject the clause). This recommendation by the Law Commission was praised by the Better Regulation Executive as "a proportionate risk-based approach to the issue" (page 8) **(IMP3)**.

In 2010 the Ministry of Justice formally accepted the Law Commission's final recommendations and its proposal for a new non-statutory rule of practice governing disclosure and explanation of exemption clauses (which, as noted above, were informed by the research). This new regulation and change of law was reported to Parliament along with a statement that the Ministry of Justice would be writing to representatives of the trust industry in England and Wales to encourage express adoption of the new rule within their codes of practices **(IMP4, IMP5)**.

As a result, post-2010 the new non-statutory rule of disclosure has been widely adopted by the trust industry in England and Wales **(IMP6)**. This is a group of significant size (numbering their millions) given that the trust is a principal vehicle for the holding of private wealth in England and Wales. Trusts are widely used in commercial and family contexts through settlements, wills, pensions, financial instruments (including international financial investments), charities and other third sector organisations (many of which operate internationally). Alongside adoption by the trust industry, the trust sector regulatory bodies have developed their own codes of practice to ensure compliance with the new regulation, such as the Law Society (which regulates the legal profession) and the Society of Trust and Estate Practitioners (which has a membership of over 17,000 and is the leading professional body for trust practitioners) see for example **(IMP7)**. In light of the extent of the trust industry, the new non-statutory rule of practice governing disclosure and explanation of exemption clauses that has been introduced has widespread application in England and Wales with the purpose of protecting both creators of trusts and those who benefit from them. The rule has also formed the basis of reform proposals in other jurisdictions, such as in the recent proposed reforms in New Zealand, where the regulation of trustee exemption clauses is being actively debated. The New Zealand Law Commission has recently proposed that trustee exemption clauses be regulated through a non-statutory rule of disclosure adapted from the one introduced in England and Wales **(IMP8)**.

The Chief Executive of the Law Commission has confirmed "I hereby endorse the claims for impact as stated in the impact case study submitted by Dr Dunn. The Law Commission is grateful to Dr Dunn for the research that she conducted on its behalf. The research was helpful in indicating trends within trust practice, and the interviews that took place were very useful in providing an

account of the experience of those operating in the field” (IMP9).

5. Sources to corroborate the impact

- (IMP1) Law Commission, Law Com No 280, Annual Report 2002-03, Cm5937 (August 2003), page 45, para 9.5. Available at: <http://www.bailii.org/ew/other/EWLC/2003/280.pdf>.
- (IMP2) Law Commission, Trustee Exemption Clauses, Law Com No 301, Cm6874, June 2006. Available at: http://lawcommission.justice.gov.uk/docs/lc301_Trustee_Exemption_Clauses.pdf
- (IMP3) Law Commission, Triennial Review of the Law Commission, February 2013, page 6. Available at: http://lawcommission.justice.gov.uk/docs/Law_Commission_triennial_review_evidence.pdf
- (IMP4) House of Commons Hansard Written Ministerial Statements for 14 September 2010 Mr Jonathan Djanogly (The Parliamentary Under-Secretary of State for Justice) HC Hansard 14 Sept 2010. Available at: <http://www.publications.parliament.uk/pa/cm/cmtoday/cmwms/archive/100914.htm#d2e164>
- (IMP5) HL Hansard, 5 Oct 2010, Column WS1, Lord McNally (the Minister of State, Ministry of Justice), Tuesday 5th October 2010. Available at: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101005-wms0001.htm>
- (IMP6) Law Commission, Final statement 2012. Available at: <http://lawcommission.justice.gov.uk/areas/trustee-exemption-clauses.htm>
- (IMP7) STEP, Guidance Notes: Step Practice Rule to Trustee Exemption clauses. Available at: <http://www.step.org/sites/default/files/Comms/STEPGuidanceNotes.pdf>
- (IMP8) New Zealand Law Commission, Review of the Law of Trusts: Preferred Approach – Issues Paper 31 (July 2012) Proposal P8(4), Chapter 3. Available at: http://ip31_publications.lawcom.govt.nz/.
- (IMP9) Endorsement Letter from Chief Executive, Law Commission (dated 25 October 2013).